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IN THE
SUPREME COURT OF THE UNITED STATES
1996 TERM

WAYNE A. LUNDQUIST, JR., PETITIONER

-VS-

PREMIER FINANCIAL SERVICES - TEXAS, L.P.,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

Whether Petitioner was denied due process of law as a result of:

(a) the District Court granting leave to amend pleadings such that a "live" pleading existed by which defense of a motion for summary judgment could be supported; and

(b) thereafter, incorrectly striking the entire pleading, including the authorized and allegedly, unauthorized amended pleadings of the affirmative defenses of waiver and equitable estoppel, as a result of the Honorable District Court's mistake that the Honorable District Court had not authorized the pleading of "waiver"; and

(c) thereafter, entering a summary judgment as a result of the "*death penalties* " order striking the pleadings which otherwise (that is, with the Amended Pleadings) was not appropriate as a matter of law.

Whether the District Court erred in granting summary judgment against Lundquist's where the record is replete with summary judgment evidence illustrating material fact issues.

PARTIES TO THIS PROCEEDING

The Petitioner respectfully certifies that the persons or entities listed below have, or may have an interest in the outcome of this litigation:

a. Wayne A. Lundquist, Jr.

b. Premier Financial Services - Texas LLP

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioner, Wayne A. Lundquist, Jr., (herein "Lundquist") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusing to hold that Lundquist was denied due process of law by the trial court's rulings that Amended Pleadings would be stricken, (the "death penalty" equivalent in civil

cases) and summary judgment entered in absence of the Amended Pleading.

OPINIONS BELOW

The opinion of the Court of Appeals was ordered not published but appears in the Appendix at page A-1. The Order denying the Petition for Rehearing appears in the Appendix at page A-4.

The unpublished written opinions and orders of the District Court for the Southern District of Texas appears in the Appendix, pages A-5, through A-53.

STATEMENT OF JURISDICTION

The Court of Appeals Opinion in this matter was filed on November 6, 1996, and the denial of Lundquist's Motion for Rehearing was filed on December 5, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

It was not a summary judgment upon "live" pleadings that resulted in this Petition. It is the denial of due process of law by the Honorable District Court refusal to permit Lundquist to respond to Premier's amended complaint after a ruling that such responsive pleading could be

made, and a mistaken belief that the Lundquist was wrong in the authorized amendment filed, that resulted in "death penalty" orders against Lundquist and the summary judgment.

This suit, brought in 1993 by Premier Financial Services - Texas, L.P. ("Premier") on a guaranty agreement ("Guaranty") signed by Lundquist in 1983. Lundquist alleges that he is not liable on the Guaranty under the express language of the Guaranty and raised a number of other defenses. The District Court, in a series of contradictory orders, struck all of Lundquist's attempts at amending his pleadings in compliance with the District Court's permission to do so. The Honorable District Court expressly authorized Lundquist to raise "four (4) affirmative defenses" and one counterclaim. The Honorable District Court then made a decision that Lundquist

(a) added "waiver" as a defense which was not authorized by the Honorable District Court; and

(b) did not properly "articulate" the defenses authorized

The District Court *struck all amended pleadings*, both the alleged amended pleadings raising objectionable defenses, notwithstanding the fact

that the Honorable District Court was mistaken (the defense of "waiver" had in fact been authorized) and absolutely no prejudice to Premier was shown either when these amendments were authorized, or when they were stricken. With no defensive pleadings on file, the Honorable District Court granted summary judgment on the Guaranty claim against Lundquist on December 6, 1995.[1] Fifth Circuit Court of Appeals affirmed the judgment of the District Court without reference to the death penalty orders, or expressing any findings regarding the uncontroverted defenses, including laches and equitable estoppel. (See Appendix. page A-1).

The events leading up to the "death penalty order" removing all pleadings responding to the live complaint of Premier, are as follows. On May 5, 1995, Premier an **unopposed** motion to amend (not supplement) *for the second time* its complaint to add a party.[2] Accordingly, in due

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1 The District Court based the Summary Judgment, in whole or in part, upon refusal to "accept" (as contrasted to permit - which the District Court had already authorized) Lundquist's attempts at amended pleadings regarding certain defenses which had previously been authorized by the District Court.

2 At the time of Premier's Second Amendments were allowed by the Court, Lundquist in good faith believed that he would have a right to file an answer to the amended pleading

order, the Court granted Premier's unopposed Motion to Amend its pleading on June 14, 1995, and on the same day the Court granted Lundquist's previously filed Motion to amend its answer to Premier's previous **First Amended Complaint** *by order which made no reference to the First Amended Answer as being deemed to apply to the "Second Amended Complaint".*[3] At this time, Lundquist's First Amended Answer was applicable only to the First Amended Complaint, having been prepared and filed long before the Second Amended Complaint was filed. ***No pleading has ever been permitted to be filed in this case in response to the Second Amended Complaint*** and a Summary Judgment was

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and believed that Premier would likewise consent, and even if not, Lundquist believed, in good faith, that: (a) he was entitled to file a responsive pleading to an amended complaint, as a matter of right; and (b) that he could have been the subject of a default judgment similar to that which had been filed against the co-defendant if he did not file an answer; and (c) that because Premier's Second Amended Complaint was permitted (and an answer must be filed) there was no necessity to seek an extension of the pre-trial deadline for amendment of pleadings in due course; and, finally, (d) because the Motion For Summary Judgment filed was based on the Second Amended Complaint, a pleading which without a responsive pleading could be taken as true.

3 Later the Court indicated that it was the intention of the order to require the First Amended Answer to apply to the later filed Second Amended Complaint. This was unknown by Lundquist's counsel until the November 2, 1995 conference with the Court.

entered on the Second Amended Complaint ***with no responsive pleading*** which would otherwise support the uncontroverted summary judgment defensive evidence of Lundquist.

In response to the filing and subsequent service of a copy of the ***Second*** Amended Complaint Lundquist filed his Second Amended Answer and Amended Counterclaim. Premier filed a Motion to Strike the Second Amended Answer of Lundquist (filed in response to the Second Amended Complaint).[4] On November 2, 1995, a hearing was held by telephonic conference on Premier's Motion To Strike the Second Amended Answer. Lundquist set forth his reasons regarding the right to file the amended answer, including the fact that no discovery (other than written interrogatories which are subject to supplement up to 30 days prior to trial) had been undertaken, in support of his request to allow the amendment. ***The Court granted leave to file an amended answer*** as follows:

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4 Accordingly, the first party or witness depositions were commenced in this case on November 10, 1995, by agreement of the parties, long after the Second Amended Answer was filed. On that date, Premier and Lundquist exchanged for the first time documents in this case.

"THE COURT: I want you to tell me for the record what your defenses are, what your affirmative counterclaims are.

. . . .

MR. JORDAN: ***Okay*** . . .

THE COURT: You started with ***promissory estoppel.***

MR. JORDAN: And ***waiver***, and ***laches***.

THE COURT: ***Okay, and that's it?***

MR. JORDAN Well, that's my affirmative defenses.

. . . .

MR. JORDAN: Insofar as affirmative recovery and to the extent that these would be ***recoupment or offset defenses***, then ***the guaranty agreement itself***.

. . . .

"MR. JORDAN: I'm not articulating myself. ***If the guaranty is not enforceable on its own terms, . . . I don't want to waive that defense . . .***"

THE COURT: ***Okay.***

MR. JORDAN: It if is, then that's the only thing I'd add is that I would like to be able to also put in there that the guaranty by its own terms only guarantees a note which has now been ***satisfied*** by ***renewal***.

THE COURT: ***Okay.***

. . . .

THE COURT: *Put in those things in there.*

MR. JORDAN: *All right.*

> THE COURT: I will grant that amendment so we can start over on a summary judgment."

The authorized amended pleadings would have ***four defenses and one counterclaim*** which included (i) promissory estoppel, (ii) laches, (iii) waiver, and (iv) the defense to the guaranty contract itself articulated two ways during the hearing (both being "Okay" with the Honorable District Court): 1. ". . . the guaranty is not enforceable on its own terms", (or put another way) 2. ". . . the guaranty by its own terms only guarantees a note which has now been satisfied by renewal."

There was absolutely no ***requirement*** by the Honorable District Court's that a pleading showing "good cause" must be filed in order to comply with the Court' directive "to file a supplemental amended answer,"[5] -- only that ". . . the Court allowed Lundquist to file a supplemental amended answer . . . ."***Id***. On November 20, 1995 (actually entered November 27, 1995, and *not received by Lundquist's* counsel until November 29, 1995) the Court

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5 One of the Court's later basis for striking the pleadings was an alleged failure to set out "good cause" to permit the amendment.

entered an inconsistent written order concerning the November 2 hearing:

> "At this hearing, ***the Court allowed (Lundquist) to file a supplemental amended answer on November 3, 1995***, limiting his affirmative defenses to the following: (1) promissory estoppel; (2) laches; (3) usury; and (4) ***that the guaranty is not enforceable by its own terms***." (Emphasis added.)

Of course, this is not what the hearing transcript revealed because "***waiver***" and "***satisfaction" by "renewal***" were expressly permitted by the trial judge (and without a requirement or caution to include "good cause" grounds to be considered in allowance of the amendment); however, this erroneous order of the Honorable District Judge began the series of problems between the District Court and Lundquist resulting in a "death penalty" order striking his pleading and a subsequent summary judgment against Lundquist on Premier's pleading which had no live pleading in response.

Although the Amended Answer authorized by the District Court raised the defense of ***"waiver" and "satisfaction" by "renewal"*** which had been expressly permitted in the November 2 hearings. Premier again filed another

Motion To Strike this pleading. Lundquist filed his response, stating that Lundquist ***only intended*** to plead the authorized "four defenses and one counterclaim" (because of the Court' previous order authorizing same) as follows:

> "(a) satisfaction by performance of the Guaranty (Admitted as appropriate by Premier that "the guaranty at issue applies only to the original note"); and
> (b) Waiver; and (authorized by the Court)
> (c) Equitable Estoppel (including equitable and promissory estoppel) (admitted by Premier as authorized by the Court); and
> (d) Laches (admitted by Premier as authorized by the Court), and
> (e) setoff and recoupment (which is a defense as a matter of law - no a new defense when a counterclaim is pending; and
> (f) an affirmative counterclaim for usury (admitted by Premier as authorized by the Court)."

Lundquist did not know until he received on November 27 the November 20 Court order[6] that the Honorable District Court believed it did not

6 It was when Lundquist received a copy of the written order that Defendant noticed that "waiver" was not included in the Court's ruling, although the Court in fact expressly authorized the defense at the hearing concerning the amended pleadings.

grant permission to raise the defenses listed in ¶ 1 of his Third Amended Answer, specifically "waiver". On November 2, 1995, a hearing was held on Premier's Stricken Motion to Strike.[7] The Court decided that the pleading of ***"waiver," was improper,***[8] and again stuck Lundquist's ***entire amended pleading***. *See*, Appendix, page A-33. At this time, the Court criticized Lundquist's Second/Third Amended Answer that the following "facts" were attempts to raise unauthorized defenses (*which the Lundquist pleading itself says is not the case*):

(a) Setoff and Recoupment (dealing only with the authorized counterclaim -- this is simply applying the law of setoff when both parties sue each other;[9] and

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7 The November 20 hearing was held at which Premier told the Honorable District Court that Premier's counsel had a conference with the clerk of the District Court and that, unknown to Lundquist, a hearing was to be held on Premier's Motion To Strike (which had been previously stricken by order of the District Court). The District Court agreed to hear the Motion at that time even without a live pleading and although the Court may not have had a copy of the response filed by Lundquist at the time. The response of Lundquist to the continuing stream of Motions To Strike was filed only November 20, 1995, and may not have been available to the Court.

8 And that any reference to "foreclosure", "fraud accident or mistake", were improper.

9 This was discussed, and is applied as a matter of law when a counterclaim is found to exist. The request for set-off

(b) Waiver; *(which was expressly authorized by the oral pronouncement of the Honorable District Court, but not by the written version of the Court's pronouncement); and*

(c) together with two other "fact" pleadings).[10]

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applied, by the specific language of the proposed pleading, only to the authorized counter-claim:

> "37. Lundquist is entitled to set off or alternative to recoup, all damages suffered by him from any claim for liability he may owe to Plaintiff, as a result of the violation of the usury law as set forth in his Counterclaim. This setoff may take the form of proof of damages as an affirmative defense or as a result of the Counterclaims filed by Lundquist against Premier."

Because the counterclaim filed by Lundquist is authorized by this Court, certainly a pleading which set forth the required application at law for treatment of offsetting damages could not be found inappropriate.

10 "Wrongful foreclosure . . . ." (which was *not* plead as a separate affirmative recovery or defense, *but as an element of damages in support of the authorized defenses of equitable (promissory) estoppel* and his denial of lawful offsets and credits pleading by Premier (The reference to wrongful foreclosure is an element of the allegation of Laches, and the injury to Lundquist (which must be plead as an element of Laches) as a result of the delays of Plaintiff in filing suit or bringing the claims against Lundquist); and

Fraud, accident, or mistake; (which was *not* plead as a separate affirmative recovery or defense, but only as an ***element of fact in support of the authorized defense of equitable estoppel, showing that Lundquist's actions (or inaction) were reasonably induced under the circumstances*** -- which could have been the result of Premier's successor's fraud, accident or mistake). As an element of equitable estoppel. An element of equitable estoppel includes when a party conceals or makes a false (not necessarily knowing) representation of

These defenses were absolutely necessary and appropriate to defend against the Premier Summary Judgment, and were completely supported by the summary judgment affidavit and documentary evidence offered in opposition to the summary judgment.

As a result of this second telephone hearing, after striking the attempted Second Amended Complaint, Lundquist was ***again authorized to file amended pleadings*** (believing he had somehow lost "waiver" as a defense in the interim). This second order following the hearing of November 20th reads as follows:

> "Defendant is given until November 27, 1995, to attempt to file answer properly setting our ***four defenses***[1] [1] ***and***

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material facts. ***Scott v. Vandor,*** 671 S.W.2d 79, 87 Tex. App—Houston [1st Dist.] 1984, ref. n.r.e.) *This element must be plead.* Promissory estoppel and quasi estoppel, also allow the defense of estoppel in absence of a "knowing" misrepresentation of a material fact. ***Fretz Const. Co. v. Southern Nat. Bank, Etc.***, 626 S.W.2d 478, 480 (Tex. 1981); ***Adams v. Petrade Intern., Inc.***, 754 S.W.2d 696,707 (Tex. App.—Houston [1st Dist.] 1988, den

[1] The written order signed the same day (reciting in writing the "previously delineated" four defenses allowed: (1) promissory estoppel; (2) laches; (3) usury (not a defense, but a counterclaim); (4) and that the guaranty is not enforceable by its own terms. Thus, the Court only recites three defenses and a counterclaim, again leaving out the fourth authorized defense -- "waiver" -- and the Court again articulates the "results" of renewal and extension of the guaranty (the actual pleading of this defense being satisfaction, payment and

counterclaim previously delineated by this Court.

Again, no reference is made by the District Court to filing a pleading showing "good cause" before the amended pleading would be considered. Reference is made to the ***"four defenses"*** which were in fact authorized (and, accordingly, which must include "waiver") even though the Court's written order only lists three (3) affirmative defenses and a counterclaim. Lundquist immediately, laboriously, and diligently rewrote his pleadings to fashion them in the manner authorized by the Court's prior order (not the hearing transcripts) and in a legally cognizable form, and filed same prior to November 27, 1995. However, on December 4, 1995 (although not known to Lundquist until December 7, 1995) the Court entered the following order:

> "On November 29, 1995, Defendant supplemented his motion for leave to file the fourth amended answer by seeking to withdraw the reference to the defense of waiver in the fourth amended answer.[12]

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performance by the renewal because the Guaranty only applied to the original note).

12 Even though Lundquist was in fact authorized to plead "waiver", this was done immediately by Lundquist upon learning of the Court' prior written order which did not authorize "waiver" -- in an attempt to soothe the District Court's

> However, the fourth amended answer stilled (sic) contained affirmative defenses not allowed by this Court pursuant to its ruling on November 2, 1995, and order signed November 20, 1995. In particular, *Defendant failed to comply with this ruling and order in* <u>*that he added the affirmative defenses of satisfaction by performance, material alteration*</u>, *release of the guaranty* <u>*and equitable estoppel*</u>. (Emphasis added.)

Lundquist ***was*** authorized to plead *satisfaction by performance and material alteration* -- the Honorable District Court expressly said "OKAY" to those pleadings. Notwithstanding this fact, on December 6, 1995, Lundquist received the final Court Order Denying Lundquist's Motion For Leave To File Fourth Amended Answer" setting forth the following grounds:

> a. "*Defendant has not shown this Court good cause* for modifying the scheduling order's deadline for amendment of the pleadings. *See*, Fed. R. Civ. P. 16(b); ***Spiller v. Ella Smither Geriatric Ctr.*** 919 F.2d 339, 343 (5th Cir. 1990);" . . .
>
> b. "Defendant has further failed to comply with the Court's order of November 20, 1995."

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now obvious opinion that Lundquist was not following orders. Now this request is ammunition against Lundquist.

Previous to this final order, *there was never an indication from the court that absent a showing of "good cause" the Court would not consider amended pleadings* -- ***the Honorable District Court authorized the amended pleadings twice already because*** the Court had expressly authorized Lundquist to amend his pleading even with the ever-changing limitations imposed. However, in a desperate attempt to understand how to appease the Honorable District Court, Lundquist *immediately* filed a Comprehensive Second Motion For Leave in order to set forth "good cause" as referenced by the District Court even though Lundquist had already two orders authorizing and directing amendment. This Second Motion For Leave To Amend pleading set forth substantial good cause, but fell on deaf ears, and all pleadings remained stricken while the District Court proceeded to enter summary judgment against Lundquist.

REASONS FOP GRANTING THE WRIT

1. <u>The Death Penalty Orders Are a Denial of Due Process.</u>

A litigant is entitled to a fair tribunal, and the denial of same is a denial of due process. Lundquist neither desired to challenge, or offend, the trial judge with his pleading attempts, and in

fact followed the rules, and the rulings, of the Court regarding the pleadings proffered. However, a mistake of fact by the trial judge (regarding the authorization and scope of allowed amendments) resulted in a series of punitive actions denying Lundquist due process of law.[13] Such a circumstance is a no-win position for any litigant. Either the order is violated, subjecting a litigant to punishment, or the order is complied with, subjecting the litigant to punishment. Such "catch 22" is a denial of procedural due process in its most basic form. The "the community's sense of fair play . . . " is violated. ***Rochin v. California***, 342 U.S., at 173, 72 S.Ct. at 210.[14] Not only must there be reality of fair trial and impartiality in accordance with due process, but

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13 So that it is perfectly clear, nothing in this Petition should be read to imply that the trial judge was intentionally biased against Petitioner, or had some motive or personal conflict with Petitioner or Petitioner's counsel. Had any such matter been involved, Petitioner would have stated same and raised 28 U.S.C.A. s 455 remedies.

14 *See also* ***Ham v. South Carolina***, 409 U.S. 524, 526, 93 S.Ct. 848, 850, 35 L.Ed.2d 46 (1973); ***Lisenba v. California***, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941); ***Hebert v. Louisiana***, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926); ***Hurtado v. California***, 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884).

appearance of fair trial and impartiality must also be exhibited.[15]

The concept of due process incorporates notions of fair notice and warning. See, e.g., ***Postscript Enterprises, Inc. v. Whaley***, 658 F.2d 1249, 1254 (5th Cir. 1981); ***Geiger v. City of Eagan***, 618 F.2d 26, 28 (8th Cir. 1980). Furthermore, a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See, e.g.*, ***Textile Workers Pension Fund v. Standard Dye & Finishing Co.***, 725 F.2d 843, 854 (2d Cir.), *cert. denied sub nom.* ***Sibley, Lindsay & Curr Co. v. Bakery Confectionery & Tobacco Workers Union***, 104 S. Ct. 3554 (1984); ***Lordermill v. Cleveland Bd. of Educ.***, 721 F.2d 550, 563 (6th Cir. 1983), *aff'd*, 105 S. Ct. 1487 (1985).[16] Finally, a death penalty order in a civil case is a clear deprivation of due process, and violates the Constitution.

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15 ***United States v. Ferguson*** , 550 F Supp 1256 (1982, SD NY).

16 It has been held that the individual must have the opportunity to be heard before there can be the deprivation of a protected interest. *See, e.g.*, ***Hatch v. Goerke***, 502 F.2d 1189, 1194-95 (8th Cir. 1974); ***Peacock v. Board of Regents***, 380 F. Supp. 108 (D.C. Ariz. 1974), *aff'd*, 510 F.2d 1324 (9th Cir.), cert. denied, 422 U.S. 1049 (1975).

The facts of this case are far different, and completely distinguishable from those case in which a trial judge relies upon mistaken fact in post-trial actions.[17] Here the trial judge's own error served as the spring board of punitive actions against a litigant which directly, and proximately, cause the denial of due process and a loss of a right to a trial on the merits of a litigants defense to a case.[18] There is "an affirmative constitutional duty to insure that a defendant has a fair trial. . . ." ***Gannett Co. v. DePasquale***, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979) free from the bias of a trial judge's mistake of fact regarding the trial judge's own direction for a litigant to take action later criticized by the same trial judge.

Determining merits of an alleged defense (even the scope of the defense) is not sufficient

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17 See, eg. ***United States v. Dean,*** 752 F.2d 535, 543-45 (11th Cir. 1985) (sentence not illegal merely because judge erroneously assumed Parole Commission would release defendant before end of full sentence; judge's assumption about future event does not fall within due process protection against judge's reliance on materially false information in evidence).

18 *See, eg.* ***Ristaino v. Ross,*** 424 U.S., at 595, 96 S.Ct., at 1021; *See, also,* ***Pacific Mutual Life Insurance Co., v. Haslip,*** 499 U.S. 1, 111 S.Ct. 1032, 1043 (1990) (If the imposition of millions of dollars of liability in this hodge-podge fashion fails to "jar [the Court's] constitutional sensibilities," *ante*, at 1043, it is hard to say what would.)

grounds to *strike the entire pleading*. ***Fox v. City of West Palm Beach***, 383 F.2d 189 (5th Cir. 1967).[19] The Honorable District Court gave no reason for striking the *non-objectionable pleadings*, which is an outright abuse of discretion. ***Foman v. Davis***, 371 U.S. 178, 182 (1962); ***Halbert v. City of Sherman***, 33 F.3d 526, 530 (5th Cir. 1994).

Lundquist's counsel in good faith attempted to, and believes in good faith that he did, comply with the Court's ruling in the Second/Third Amended Answer and Amended Counterclaim. The Honorable District Court authorization to plead the defense of "waiver" and, as important, "that the guaranty is not enforceable by its own terms"[20] was the only pleadings sought to be filed by Lundquist, and required to be in the following format:

(1) "***satisfaction by performance***" (objected to by the District Court) is simply that the "guaranty at issue applies only to the original

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19 *See, eg.*, ***Key Pharmaceuticals, Inc. v. Lowey***, 54 F.R.D. 447, 449, n.5 (D.C.N.Y. 1972).

[20]Premier admits that this Court granted permission of Premier to plead ". . . that the guaranty at issue applies only to the original note. . . . " This defense, however inartfully set forth, must be plead in the form of an appropriate legal defense

note . . ." and therefore, the guaranty has been "satisfied by performance" (the original note was renewed). This defense is exactly what the Honorable District Court approved, although because there is no legally articulated defense that "the guaranty applies to the original note" it is clear what was meant; that the note has been satisfied -- by renewal, or, that indebtedness has been substantially and materially altered -- by renewal.

(2) ***"alteration of indebtedness"*** which is the proper legal way to express the defense that "the guaranty at issue applies only to the original note" because the renewal "altered" the original debt to which the guaranty applied. This is simply a pleading that if the original guaranty is not "satisfied by performance" (*See*, above), it is satisfied, paid, released, or unenforceable by "alteration" *because* the Guaranty applies only to the original note and the renewal is an "alteration" to which the Guaranty did not apply.[21]

Lundquist attempted to precisely comply with the District Court's order, both with

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[21] The general rule in Texas is that a guarantor is not liable on a guaranty if a note has been extended. *See*, ***United States v. Vahlco Corp.***, 800 F.2d 462, 465 (5th Cir. 1986); ***Tomlin v. Ceres Corp.***, 507 F.2d 642, 646 (5th Cir. 1975).

academic honesty and in good faith, as well in a judicially respectful manner. No evidence exists in this record that such attempts at pleadings were in bad faith, argumentatively made, or in any manner sanctionable so as to justify the death penalty orders entered.

2. "After the Fact" Finding That "Good Cause" Was Not Plead Was A Denial of Due Process:

"Good Cause" should not have been an issue in this case. The Honorable District Court already granted permission to file the amended petition, and the issue of the need, basis, and "good cause" were thoroughly discussed in the November 20 hearing. Good cause is only an issue if the amendment has not previously been authorized by an order (eg., pre-trial, scheduling, etc.). To have re-resurrected a "good cause" standard, without notice, and without a hearing, to justify death penalty order striking *all* pleadings is a denial of due process. As a direct result, Lundquist was required to attend trial on a summary judgment without a live pleading, all pleadings responding to Premier's Second

Amended Complaint having been stricken by the Honorable District Court.[22]

Even if Lundquist's counsel was wrong concerning the "right" to file the Second Amended Answer as set forth in Rule 7a, Fed. R. Civ. Proc., the only resulting error was failing to seek leave of the Court prior to filing the proposed Second Amended Answer. Rule 15(a), Fed. R. Civ. P. provides that where leave of court is required to file an amended complaint that "leave shall be freely given when justice so requires." *See, also* ***Forman v. Davis***, 371 U.S. 178, 182 (1962); ***Halbert v. City of Sherman***, 33 F.3d 526, 530 (5th Cir. 1994). And leave was granted -- only later to be taken back on mistaken ground far different that when originally. This Court has recognized the danger of denying a litigant his day in court without pleadings necessary to present his case:

> "Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded . . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the

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22 The pleadings were stricken at a time when Premier had not even taken the deposition of Robert D. Thorpe, being taken by agreement after the November 3, 1995 hearing.

merits." ***Forman v. Davis***, 371 U.S. 178, 182 (1962).

Although the Fifth Circuit recognizes this liberal approach of freely granting amendments to pleading, particularly, as here, early in the litigation and the discovery process [. . . the courts have given Rule 15 not lip service merely but full fealty." ***Copeland Motor Co. v. General Motors Corp.***, 199 F.2d 566, 567-68 (5th Cir 1952)].[23] In this case, however, the Fifth Circuit deferred to a "do not publish" opinion regarding a simple mistake by the Honorable District Court obviously resulting from faulty notes or faulting briefing attorney notes. Waiver was a viable defense, and was authorized, but when it became an issue arising from a mistake by the Honorable District Court, the mistake became grounds to simply "move the case" in lieu of retracting the mistaken order and trying the case on its merits. It cannot be argued that Premier did not have adequate time for discovery on all issues raised by the proposed amended pleading and did not suffer any unfair prejudice from the filing of the Amended Complaint. It was only after the Honorable District Judge permitted the filing of

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23 ***Yunclan v. Department of Air Force***, 943 F.2d 1388, 1391 (5th Cir. 1991).

the amended pleading, never mentioning, suggesting, much less requiring, that "good cause" be shown *before* the amendment was authorized, that the issue arose. Good cause existed, in any event, clearly established by the response of Lundquist. This ground was an "after the fact" finding by the Honorable District Court, outside any applicable law and without a basis in fact, and constitutes a denial of Lundquist's due process rights.

3. **The Summary Judgment Was Improper If the Death Penalty Order Had Not Been Rendered:**

Summary judgment could not be sustained *if* Lundquist's pleadings had not been stricken. Lundquist's legal and factual position, supported by his timely filed summary judgment evidence in response in opposition to the Motion For Summary Judgment of Premier, was that:

(i) Premier is not a holder in due course, and

(ii) the Guaranty is not a negotiable instrument, thus Premier took the Guaranty subject to all of Lundquist's defenses, including waiver, laches and estoppel.[24]

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24 Lundquist's Affidavit: Lundquist found out seven (or eight) years later that he *might* be considered liable on the

The ***uncontroverted evidence*** in opposition to the summary judgment includes the Affidavits of Wayne A. Lundquist. This Summary Judgment opposition proof was uncontradicted. There are ***no opposing affidavits or proof from Premier to the Affidavits of Lundquist and Thorpe***, only objections which are addressed herein. ***But for the death penalty order*** the defenses of Lundquist (*at least* those permitted to be filed by the Court's orders) show that material fact issues exist in this case sufficient to overcome a motion for summary judgment.

A. THE DEFENSE AND EVIDENCE IN SUPPORT OF LACHES PREVENTS SUMMARY JUDGMENT

The equitable doctrine of Laches will bar a case before the period set forth in an applicable limitation statute if accompanied by some element of estoppel or extraordinary circumstances that would render it inequitable to enforce the plaintiff's right after the delay.

Guaranty (based on renewed notes) notwithstanding the oral agreement and the terms of the Guaranty. Lundquist promptly hired a lawyer and set out his concern *in writing* to Premier's predecessor in interest, denying liability based on the Guaranty and the oral agreement. No action was ever taken by the RTC or the FDIC on the Guaranty after this notice. Ten (10) years after execution of the Guaranty, Premier (after buying the Guaranty) sued Lundquist, not for the debt provided in the Guaranty, but for a series of renewals long in default.

Barfield v. Howard M. Smith Company of Amarillo, 426 S.W.2d 834, 840 (Tex. 1968); ***Helsley v. Anderson***, 519 S.W.2d 130, 133-134 (Civ. App. -- Dallas 1975, no writ). Laches prevents a party from having to defend against "stale" claims ***even if limitations has not run.*** *See*, ***Burbee v. Castlewood Civic Club***, 737 S.W.2d 366, 369 (Tex.App. -- Houston [14th Dist.] 1987, no writ. Claims become "stale" when the evidence becomes lost, whether due to the death or disappearance of witnesses, faded memories, the disappearance of documents, and so forth. *See* ***Murray v. San Jacinto Agency, Inc.***, 800 S.W.2d 826, 828 (Tex. 1990). These facts are established by the affidavits of Lundquist.

B. THE DEFENSE AND EVIDENCE IN SUPPORT OF PROMISSORY ESTOPPEL PREVENTS SUMMARY JUDGMENT:

This Court's Summary Judgment ignores the uncontroverted facts establishing a right to the defense of equitable estoppel.[25] Each element of promissory estoppel is established in the record in this case. Lundquist relied on a promise, and waited *almost eleven years* to

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25 It is important to note that promissory estoppel and equitable estoppel are often interchangeable terms in Court opinions. ***Wilson v. Alexander,*** 50 S.W.2d 440, 441 (Civ.App.-- Ft. Worth 1932), rev'd on other grounds, 77 S.W.2d 873.

discover that a "vulture fund" was suing him on the Guaranty. Promissory estoppel is primarily a defensive plea that prevents a party from insisting on strict legal rights when it would be unjust to enforce them.[26] Estoppel operates to prevent one who has induced another to act in a particular way from adopting an inconsistent position, attitude, or course of conduct that will cause loss or injury to the other person and when one party, because of the other party, has been induced to change his or her position for the worse.[27] *The facts offered in support of the defense of estoppel, and in opposition to the summary judgment were uncontroverted,*[28] yet summary judgment, with no pleadings in opposition, was entered.

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26 *See* ***"Moore" Burger, Inc. v. Phillips Petroleum Company***, 492 S.W.2d 934, 936 (Tex. 1972). (Promissory estoppel prevents a defendant who had promised to sign a lease but failed to do so from relying on the statute of frauds as a defense to an action for breach of the lease.

27 ***Houtchens v. Matthews***, 557 S.W.2d 581, 585 (Tex. Civ. App.—Fort Worth 1977); ***Swiderski v. Prudential Property & Cas. Ins.***, 672 S.W.2d 264, 269 (Tex.App. -- Corpus Christi 1984, writ dis.).

28 Promissory Estoppel can operate to prevent a party from exercising or insisting on a contractual term or limitation. ***Hampton v. State Farm Mut. Auto Ins.***, 778 S.W.2d 476, 479 (Tex. App.—Corpus Christi 1989, no writ). ***Roberts v. Haltom City***, 543 S.W.2d 75, 80 (Tex. 1976). ***Texas Bank & Trust v. Lone Star Life Ins.***, 565 S.W.2d 353, 358 (Civ. App.—Tyler 1978, no writ).

C. PAROL EVIDENCE RULE DOES NOT APPLY -- ADDITIONAL OR SUPPLEMENTAL TERMS OR AGREEMENTS SHOULD HAVE BEEN CONSIDERED

It is uncontroverted (for summary judgment purposes) that at the signing of the Guaranty, Lundquist was told by an authorized representative of Premier's successor that his guaranty would only apply to the initial Note and would only be in force and effect for the term of the Note; and that if the Note was renewed and extended he would have no liability thereafter. *No contrary evidence was proffered by Premier to overcome this contention.*

In addition, a *"collateral agreement" is* one that the parties might naturally make separately and that they would not ordinarily be expected to embody in writing, and must not be so clearly connected with the principal transaction as to be part and parcel of it. ***Boy Scouts v. Responsive Terminal Systems***, 790 S.W.2d 738, 745 (Tex. App.— Dallas 1990, den.)].[29] The evidence

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29 The parol evidence rule does not apply when there is not a complete identity of parties and subject matter between the contract being interpreted and the evidence proffered of some other agreement particularly where it appears a separate agreement was made. *See* ***Smith v. Smith***, 794 S.W.2d 823, 828 (Tex. App.—Dallas 1990, no writ). It is uncontroverted that the Guaranty was an agreement between six parties (five

offered by Lundquist clearly establishes that the dealings with Sue Beagle, an agent of Victoria Savings Association, were not excluded by application of the parol evidence rule on both grounds for a collateral agreement.

Controverted facts exist which should have prevented summary judgment.

CONCLUSION

Lundquist has been punished without a violation of laws or rules. His attempt to satisfy the Honorable District Court were appropriate, within the rules, and respectful. The Honorable District Court made a mistake, yet instead of acknowledging same and entering an order limiting "any" pleading's scope effectively ignored the error, added additional burdens "after the fact" and entered a "death penalty" order denying a due process forum. Accordingly, Lundquist requests that the judgment of the Honorable District Court be reversed and the case set for trial on the merits.

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guarantors and VSA) and the evidence offered by Lundquist relates only to a "collateral agreement" dealing with VSA and one Guarantor, Lundquist. Application of the parol evidence rule is improper and defeats summary judgment.

Dated: March 5, 1997.

Respectfully submitted,

Shelby A. Jordan
Attorney for Petitioner

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